APPENDIX A

IN THE CIRCUIT COURT OF PUTNAM COUNTY,
WEST VIRGINIA

EAGLE RESEARCH CORPORATION,

Plaintiff,

v. Civil Action No. 03-C-119

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC., and
DANIEL MEASUREMENT SERVICES, INC.,

Defendants and Third Party Plaintiff,

v.

JIM BUTCH,

Third Party Defendant.

AMENDED FINAL JUDGMENT ORDER
and
RULINGS ON POST-JUDGMENT MOTIONS

On May 5, 2006, the Court entered an order granting judgment to the plaintiff. The parties then filed written post trial motions. On June 15, 2006, the parties appeared for purposes of oral argument on their various written post-trial motions. The Court announced its ruling in open court on the various motions, but the parties have been unable to agree upon a written order memorializing the Court's oral rulings. Following the hearing of June 15, 2006, the parties filed motions seeking this Court's reconsideration of certain rulings of the

Court announced at the June 15, 2006 hearing. The motions for reconsideration are considered in a separate order entered this date. Accordingly, the Court is of the opinion to and doth hereby order as follows:

1. The "Motion of Plaintiff for a New Trial Pursuant to West Virginia Civil Procedure Rule 59(a) Against Emerson Electric, Inc. and Daniel Industries, Inc., on the Plaintiff's claim for tortious interference with a contract is hereby **DENIED** for reasons stated upon the record.

2. The "Plaintiff's Motion for Attorney Fees" is hereby **DENIED** as the Court finds that the trade secrets counterclaim did not have a material effect on the Plaintiff and for other reason stated upon the record.

3. The Plaintiff's "Motion for Entry of Judgment Included Award of Pre-judgment and Post-judgment" is granted in part and denied in part as follows:

(a) Post-judgment interest on the total final judgment entered herein is granted pursuant to West Virginia Code §56-6-31 from May 8, 2006, the date of entry of final judgment, at the rate of ten percent per annum. The Court notes that this statute was recently amended by Acts of the Legislature effective June 7, 2006, but finds the former version of the statute applicable to this case.

(b) Pre-judgment interest on the Plaintiff's claim for breach of the contract to purchase the 2,954 flow meters is appropriate pursuant to West Virginia Code §56-6-27 because the Plaintiff's submitted this cause of action founded on contract to the jury and the jury made an award accordingly.

(c) Pre-judgment interest on the Plaintiff's claim for breach of the confidentiality agreement is denied because the Plaintiff did not submit this cause of action founded on contract to the jury and, therefore, waived any claim for pre-judgment interest on this breach of contract claim.

4. The Plaintiff's "Motion for Appointment of a Commissioner" and request for written and other discovery in aid of execution of judgment is **DENIED** as moot in light of the Court's intention to set an appeal bond at the appropriate juncture and for other reasons stated upon he record.

5. The Plaintiff's "Motion for an Appeal Bond" is deferred until the appropriate time.

6. The Plaintiff's "Motion for the Return of Source Code" is **DENIED**, without prejudice, pending a decision by the Defendants regarding reciprocal treatment of each party's source code, and for other reasons stated upon the record.

7. With respect to the jury's damage award of four million dollars regarding the breach of the contract for the purchase of the remaining 2,954 flow meters, even in a light most favorable to the Plaintiff, the evidence supports an award of no more than $1,993,950.00.

Additionally, the jury awarded the Plaintiff pre-judgment interest of $400,000.00 on its award of four million dollars, but that award should be reduced proportionately.

Accordingly, the Court limits the jury's award of four million dollars for the breach of the contract claim for the 2,954 flow meters to $1,993,950.00 and the jury's award of $400,000.00 for pre-judgment interest on his claim to $199,395.00,

and accordingly hereby enters **JUDGMENT** in these amounts against the defendant, Daniel Measurement Services.

8. Further, the Court concludes, for reasons stated upon the record, that it will not set aside the damage award for breach of the confidentiality agreement as sought by the defendant, but enters **JUDGMENT** against the Defendant, Daniel Measurement Services, Inc., in the amount of $10,500,000.00 for breach of the confidentiality agreement.

9. The Court enters **JUDGMENT** in favor of the Plaintiff, Eagle Research Corporation, on the counterclaim of the Defendant, Daniel Measurement Services, Inc., which were withdrawn during trial, in favor of the Third-Party Defendant, Jim Butch, on the third-party claims of the Defendant, Daniel Measurement Services, Inc.; and in favor of the Defendants, Emerson Electric Co. and Daniel Industries, Inc., on the tortuous interference claims of the Plaintiff, Eagle Research Corporation, because the Plaintiff did not file its claim within the statute of limitations as determined by the jury.

WHEREFORE, the Court is of the opinion to and doth hereby enter **FINAL JUDGMENT** in favor of the Plaintiff, Eagle Research Corporation, against the Defendant, Daniel Measurement Services, Inc., in the total amount of $14,781,051.50.

The Clerk of this Court is hereby directed to send a copy of this Final Order to (1) Ancil G. Ramey, Attorney at Law, Post Office Box 1588, Charleston, West Virginia 25326; (2) Roger A. Decanio, Attorney at Law, 1598 Kanawha Boulevard East, Charleston, West Virginia 25311; (3) William C. Forbes, Attorney at Law, 826 Oakwood Road, Charleston, West

Virginia 25314; (4) Michael Moore, Attorney at Law, Post Office Box 2031, Charleston, West Virginia 25327; (5) John L. Tate, Attorney at Law, 400 West Market Street, Suite 1800, Louisville, Kentucky 40202-3352; and, (6) Robert J. McAugham, Jr. Attorney at Law, 3400 JP Morgan Chase Tower, 600 Travis Street, Houston, Texas 77002.

Entered this 3rd day of August, 2006.

/s/_____
O.C. SPAULDING, Judge

APPENDIX B

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH CORPORATION,

Plaintiff,

v. CIVIL ACTION NO. 03-C-119

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC.,
DANIEL MEASUREMENT SERVICES, INC.,
and VALTRONICS, INC.,

HEARING had in the above-styled action before the Honorable O.C. Spaulding, Judge, on Wednesday, the 15th day of June, 2006.

* * * *

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. . . Court gave the jury on the measure of damages, is that in fact an accurate description in the law? Did I accurately instruct the jury how they were to measure it? And if it is accurate, tell me what the evidence was that shows the jury applied that law of measuring damages.

MR. DECANIO: Would you mind reading the section in the Court's instruction into the record?

THE COURT: Sure. "Then you may award damages in an amount of money which fairly

compensates Eagle Research to the extent possible for reasonably ascertainable losses proximately caused by the breach."

MR. DECANIO: Thank you, Your Honor. That instruction was perfectly correct because what the loss was caused by the breach of the confidentiality was the loss of this technology. Mr. Tate one time, I'm actually quoting Mr. Tate, he said before this Court that "once you let the cat out of the bag" -- it may not be an exact quote -- "it's out forever. We can not put it back in."

THE COURT: So they suffered loss of technology.

MR. DECANIO: Exactly.

THE COURT: Now, let's start calculating what the evidence was as to what the loss of this technology cost them. What's the evidence as to that loss?

MR. DECANIO: With regard to those damages, what the . . .

* * * *

[Pages 60-61]

. . . architecture in the Eagle computer found in their new computer but not in the old computer.

You had Mr. Randy Page testifying that he looked at the system architecture when obviously and clearly he was not an employee of DMS.

You had Mr. Randy Page and Irv Swartrzenberger, two leading developers of the new computer, 103/104, go down and review DMS.

THE COURT: I guess I just don't, I don't follow your argument.

MR. DECANIO: I think what I'm trying to say, Your Honor, is that the evidence shows that obviously there was a breach, there was evidence to show that this new computer was a result, and like you said in your instruction, a cause of that breach --

THE COURT: I'm assuming all that. We started this whole conversation with that assumption, okay?

MR. DECANIO: Okay.

THE COURT: Bottom line is I take it that your support that the jury followed the law on the measure of damages regarding the breach of the confidentiality agreement rests upon Plaintiff's Exhibit F, Plaintiff's Exhibit E, and that testimony you've just described to the Court.

MR. DECANIO: Correct. And what the jury was thinking in the jury room, one can only surmize. Who knows what they were thinking. Compromise or what, I don't know. But I believe they followed your instruction to the letter, Your Honor.

THE COURT: All right. Now, anything further you want to tell me? Do you want to address the issue that he raised that e-mails do not make a --

MR. DECANIO: Yes. That wasn't raised in Mr. Ramey's brief, but had it I would love to respond to it because I know there was a West Virginia Bar article about a year ago that came out and talked about how technology is forcing the law to keep pace with the change of the 21st century. I cited in my brief also The World is Flat by Tom Freidman which also talks about the change in business, the change in technology, how one doctor in the United States is actually sending via fiberoptic message an x-ray to India or New Zealand.

THE COURT: And what's your point?

MR. DECANIO: The point is, Judge, it's time to re-think this old archaic law; that in the age of electronics you should be making new law, Judge, in saying that e-mails do it.

THE COURT: Is that what your saying?

MR. DECANIO: Not new law, Your Honor. I'm just saying that it is the law. It is consistent with the law.

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[Pages 88-99]

. . . course, I read all this before I came in here and I've also read -- these are the remaining motions, okay. This stack here. Anyone wish to add anything to the remaining motions or do you stand upon your briefs and what's been set forth? I don't want to cut anybody off, but at the same time if you want to add anything, I'll permit either side to.

MR. FORBES: We don't have anything else to add, Your Honor. We're sure you can read and understand the issues.

THE COURT: Then the Court's ready to start ruling.

MR. RAMEY: Thank you, Your Honor.

THE COURT: The first thing the Court in evaluating that, I would comment, this is the only time, I would say in all of this long litigation, that I finally had agreement of the parties on something, and both of you agree I made a ton of errors in this case. And I find that comforting. It's the best job I've seen of pointing out the Court's error by both

sides. So I'm glad to see you at least agreeing on something. And I don't personalize it.

Now, let's -- The standard, you know, I've got to give all reasonable inferences to the non-movant party. And I can tell you that I've got some troubles in this case. And I'm going to specifically deal with them.

First of all, all the issues that have been raised by the defense regarding the contract, existence of the contract, the existence of the mutuality contract, the purchase contract, I think our record is pretty clear on that and, you know, if I'm wrong, I'm wrong. The arguments are there, they're stated. I always tended to give my reasoning and hopefully it can be judged accordingly, and I'm not going -- If I made a mistake, I'm going to continue to compound that mistake and I'm not going to find as a matter of law that there were no contracts in existence.

I will tell you though, that what I am -- And so I deny the defense motion.

I tell you what I am most troubled with in all of this -- this is where hindsight helps you see more clearly -- is the measure of damages in this case. Assuming arguendo that we have establishment of the contracts, et cetera, I'm still struggling with the measure of damages. And I will tell you at this point I'm going to reduce the verdict regarding the jury's award of damages on the breach of the contract for the sale and purchase. This argument today has helped me confirm what I thought. And let me tell you to what and why I am doing it.

The jury returned a verdict of $4,000,000 for the breach of the contract for the sale of the purchase. If I look at the facts in the light most favorable to the

plaintiff that you supply me, you give me $3,891,865, that which was testified by Mr. Butch. So looking at it totally in favor of the plaintiff, I still see the jury exceeding that.

Now, also though, the documents that have been given the Court today also tell me that the plaintiff has relied on Plaintiff's Exhibit No. 748, that was Mr. Butch's calculation. Also plaintiff has provided me Plaintiff's Exhibit No. 62 and also Plaintiff's Exhibit --

MR. DECANIO: No. 113, Your Honor?

THE COURT: Well, the other one I found no real help to me. I'm going to base my decision on 62 and 748. Now, I understand the physical document wasn't admitted into evidence, but we had testimony. And as you ably pointed out, Mr. Decanio, that jury took a lot of notes, they were given paper, they were given pencils, and had them.

Here's my problem. This calculation in Exhibit No. 748 I find speculative as to the issue of the add-ons. I'm going to use the term add-ons. You called them comm options, communications options. Your Exhibit No. 62 says, in describing the different prices, and this was sent by Dave Kimberling at Eagle Research, and his second one is $1,350, "based on your current commitment for 3,000 units during the next 12 months." So the plaintiff's evidence was that the commitment, when considered in the light most favorable to the plaintiff, was $1,350. That's what you state your understanding of their commitment.

Now, you're not entitled to the gross price, your own witness says you got fifty percent profit margin. So the jury was instructed they would have to

eliminate, reduce from that, your cost, et cetera, because you were limited to the measure of damages set forth on Pages 7 and 8. So you already were compensated out of the 3,000 units for 46 units, and I'm basically using Mr. Butch's own calculations. So that left you 2,954 units that you didn't get to sell, that the contract told you you were to sell. And of the -- Of those then, if you multiply that by $1,350, what you believe was the firm commitment as your Exhibit No. 62, that comes out to $3,987,900. That's the gross price. That's 2,954 units times $1,350.

Now, your own evidence is you're only entitled to fifty percent of that, that was your profit margin. So if I take fifty percent out of that gross price for which you had a contract, your lost profit was one thousand -- excuse me, $1,993,950. So I am reducing the jury's award to comport with the evidence in the light most favorable to the plaintiff and I'm reducing that award down to $1,993,950.

Now, let's deal with the confidentiality agreement. I'm going to deny the defense motion and I'm not going to reduce it, though I will tell you that I'm concerned with it. But if I look at it, everything in the light most favorable to the plaintiff, what I'm most concerned was obviously what I raised in my questions, and that is how I instructed the jury -- I'm talking about the breach of the confidentiality agreement -- the measure of damages. "Then you may award damages in an amount of money which fairly compensates Eagle Research to the extent possible for reasonably ascertainable losses proximately caused by the breach." I did not instruct the jury that they could take their profits away from them. Maybe that was

what the law allowed, maybe that was a proper way, but I didn't instruct the jury that way.

And I'll be frank with you, I cannot recall now whether the plaintiffs at that time said "Judge, this is a wrong instruction, you ought to be instructing the jury that they can base the measure of damages on the lost -- based on taking away profits." I don't have a memory of that. I don't think you did, I'm not sure. I can't wade through them all at this stage, and so I'm going to leave that as it is. I'm going to deny the defense motion in regard to that as well.

So essentially I have, to net it out, I'm denying the defense motions for the reasons previously stated, but I am going to reduce the jury's verdict as to the breach of contract regarding the sale of the purchase.

As to the plaintiff's motion for new trial on the issue of the breach of the confidential -- excuse me, breach of the torturous interference with the contract, that claim, you know, we've hashed that, we've thrashed it, I've got a record on it. If I'm wrong, I'm wrong. I'm going to deny that plaintiff's motion.

Now, let's take up all these others. Motion for appointment of a special commissioner, the Court denies. It's premature.

The Court denies the motion to order the defense to start providing sworn statements in aid of execution. Likewise that's premature, motion is denied.

Plaintiff's motion for entry of judgment, including award of prejudgment interest and post-judgment interest. Well, the prejudgment interest, you've got two issues. You got the breach of contract,

sale of purchase, the jury gave $400,000. The plaintiffs feel that the Court should increase that amount of $400,000. I'll be frank with you, I can't calculate -- I can't figure out how they got $400,000. They took ten percent of the amount. I know how they did it, I'm not sure based on the Court's instructions how they came up with that figure. And quite frankly, I'm not sure as to how to, whether that should be reduced or not.

Let me ask Mr. Ramey a question: Since I reduced the award, should the prejudgment interest award be reduced accordingly? Why or why not?

MR. RAMEY: In all likelihood, because you reduced it proportionately, you probably ought to reduce the prejudgment interest award proportionate. And I've done it roughly one half of the original verdict, so if the jury's intention, and we can only assume from the verdict it was their intention to calculate prejudgment interest on the gross award. Now because the gross award has been reduced by one half, it would make sense to reduce the prejudgment interest on that.

THE COURT: Mr. Decanio, Mr. Forbes?

MR. FORBES: Your Honor one, I like the Court am not quite sure how they arrived at the $400,000 figure. But if you read the Court's instructions in the previous -- or the verdict form in the previous thing, they found, agreed that Mr. Butch was entitled to prejudgment interest at ten percent per year of the contract. Then they come up with a $4,000,000 contract price, then they award ten percent of that. And I would assume, I think it's appropriate to reduce it by the amount the Court reduced the award, but do it per year for the entire term of the

six years of the contract for the years the contract was breached.

THE COURT: I'll decline to take you up on your offer.

MR. FORBES: The other problem is we don't know how they arrived at the figure because --

THE COURT: I'm going to reduce the award of prejudgment interest commensurate with the new award. We can see they took ten percent of $4,000,000, so take ten percent of $1,993,950 and that's prejudgment interest. The Court would find that that issue the plaintiffs requested, that prejudgment interest be submitted to the jury, they were entitled to that under 56-6-27, it was submitted to the jury, the jury made its decision. Again I'm not going to look behind that, I'm not going to increase it, I'm not going to say "well, how many years did they do it? One year, two years or ten years?"

As to the confidentiality agreement the plaintiffs now want me to add prejudgment interest to that. It's a contract issue, just like the other one was. The plaintiffs didn't submit it to the jury, so it's waived and the Court would deny prejudgment interest on the breach of the confidentiality agreement.

* * * *

APPENDIX C

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH CORPORATION,

Plaintiff,

v. Civil Action No. 03-C-119

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC., and
DANIEL MEASUREMENT SERVICES, INC.,

Defendants and Third Party Plaintiff,

v.

JIM BUTCH,

Third Party Defendant.

ORDER DENYING MOTIONS TO RECONSIDER

Following the hearing of June 15, 2006, on post trial motions, both parties filed motions for reconsideration based on the oral findings of the Court made at the hearing. The parties were unable to agree on a written order reflecting the Court's oral findings of June 15, 2006. This order reflects the Court's rulings regarding both parties' motions for reconsideration.

The Court **ORDERS DENIED** the plaintiffs' Motion to Reconsider regarding the reduction of the amount of damages awarded by the jury for the breach of contract by Daniels Measurement Services

(DMS) for the sale and purchase of 3,000 flow meters.

The jury awarded the plaintiff four million dollars for the breach of the contract. An amount of $4,000,000.00 is in excess of the amount supported by the evidence.

There was sufficient evidence for the jury to find that the defendant, DMS, agreed to purchase 3,000 flow meters from the plaintiff, Eagle Research. These flow meters were to be subsequently resold to gas well customers, but the mode of communicating between the flow meters and the data gathering source needed to be customized to the customer's individual requirements. The customer's requirements would vary depending on the customer's specific situation. In its Supplement to Plaintiff's Motion to Reconsider, the plaintiff acknowledges this uncertainty when it stated, "The customers would select the method of communication that best suit their needs. Sometimes, the industrial setting required the selection of one method of communication over another. A wireless cell phone option may not work well in some settings."

The issue is how to calculate the price of the various communication options necessary to transmit the data from the flow meters when it is not known to whom these ultimate customers are or their specific needs.

All parties agree that 46 of the flow meters were sold, bought and paid for by Daniel Measurement Services. The damages are based on the failure of DMS to purchase the remaining 2,954 units.

The plaintiff's own evidence is conflicting as to whether these units were to be purchased within one

year or over a five year period. For example, plaintiff's exhibit 62 recites a one year commitment while the punch list in plaintiff's exhibit 113 says that it is a five year commitment.

Several of the plaintiff's exhibits discuss various options and the prices therefore. See plaintiff's exhibits 62, 113, 129, 83 and 255.

Significantly, in exhibit 62, Dave Kimberling, agent of the plaintiff, Eagle Research, e-mailed Mike Johnson and Lee Burkett of the defendant, DMS, In the e-mail, the plaintiff describes certain options and the prices thereof. One price quote is described as "$1,350.00 - Based on your current commitment for 3,000 units during the next 12 months...." Another is described at a price of $1,492.65 per unit, while another is at an even lower price per unit of $1,150.00. The other exhibits describe other price/option possibilities.

Everyone agrees that a functioning unit in the field would need some form of communication at some cost. What were the remaining 2,954 units to cost the defendant when the issue of the communication options and their cost was fluid?

James Butch, President of Eagle, testified as to the plaintiffs' damages for the breach of the contract. He offered the jury plaintiff's exhibit 748 in which his personal notes reflected his calculation of the damages based on a fifty percent profit margin. His calculation recognizes a "Quoted Base Price of Flow Computer: $1,350.00". That quoted base price is consistent with the above quoted e-mail from his employee, David Kimberling who also stated a price of "$1,350.00 - Based on your commitment for 3,000 units during the next 12 months...." Mr. Butch then calculated his loss at $1,993.950.00 based on 2,954

units sold at the base cost of $1,350.00 per unit with a fifty percent profit margin. This is the figure the Court used to reduce the jury's award.

The Court acknowledges that the 3,000 flow meters when installed in the field would need some form of communications so that the data the flow meters collected could be electronically transmitted. Thus, in most instances, the flow meters would need additional communication capability to be field operational. When the evidence is considered in the light most favorable to the plaintiff, it is clear that the jury could have found that the base cost for the 3,000 units was $1,350.00 per unit as testified by Mr. Butch and confirmed in Mr. Kimberling's e-mail. Though the parties agreed to the base price, the issue before the Court is whether there was an agreement for the costs of the communication options or at least a method of calculating the cost of the communication options with reasonable degree of certainty.

The Court further acknowledges that in his testimony Mr. Butch also testified that he anticipated the unbought flow units would also include options at an average price of $1,284.97 per unit. See, the aforesaid plaintiff's exhibit 748. Mr. Butch stated the plaintiffs' damages were $3,891,865.00 based on all 2,954 flow meters costing $2,634.37 per unit ($1,350 base price plus $1,284.96 for options). However, it is worth noting that even this calculation of the damages by the plaintiff's president is less than the four million dollars awarded by the jury. None of the parties can offer with reasonable certainty how the jury calculated and awarded more damages than the plaintiff's president requested.

In his testimony, Mr. Butch reached his conclusion of $1,284.97 for the added cost of options for each of the remaining unsold 2,954 units by calculating the average cost of the communication options for the forty-six units that OMS did purchase from Eagle. The problem with this method of calculation is that it fails the "reasonable certainty test" with respect to the damages Eagle was required to prove. The problem for Eagle is that of the 2,954 units to be ultimately resold by DMS to individual users their individual needs would dictate the ultimate purchase. Only the price of the base unit was firm. The flow meters that Eagle was to build were standard and their cost predictable, but how the flow meter installed in the field would communicate with the data gathering system would vary with each customer. The possibilities remained that DMS would purchase none of the communication options from Eagle; that DMS would purchase all of the options from Eagle; that DMS would purchase some, but not all of the options from Eagle; or, that the ultimate customers would supply their own options depending upon their individual needs and applications. The parties may have agreed to the base price of $1,350.00 per unit, but there was no agreement on the cost of the communication add-ons. Mr. Butch's method of calculating the plaintiff's potential profit for the communication options for the flow computers is precatory speculation, based on averaging from a small, unrepresentative sample of 46 units which DMS bought out of the 3,000 which would have been purchased.

For the reasons herein cited, the Court's ruling on June 15, 2006, to reduce the plaintiff's award for damages on the breach of the contract for the flow

meters is affirmed and the plaintiffs motion to reconsider is denied.

Following the hearing of June 15, 2006, the defendant, DMS, also filed a motion requesting this Court to reconsider its decision to uphold the plaintiff's damage award for the breach of the confidentiality agreement. The plaintiff filed a response. The Court has considered the defendant's motion and the plaintiff's response thereto, but declines to change its ruling as stated at the June 15, 2006 hearing based on the record.

The Clerk of this Court is hereby directed to send a copy of this Order to (1) Ancil G. Ramey, Attorney at Law, Post Office Box 1588, Charleston, West Virginia 25326; (2) Roger A. Decanio, Attorney at Law, 1598 Kanawha Boulevard East, Charleston, West Virginia 25311; (3) William C. Forbes, Attorney at Law, 826 Oakwood Road, Charleston, West Virginia 25314; (4) Michael Moore, Attorney at Law, Post Office Box 2031, Charleston, West Virginia 25327; (5) John L. Tate, Attorney at Law, 400 West Market Street, Suite 1800, Louisville, Kentucky 40202-3352; and, (6) Robert J. McAugham, Jr. Attorney at Law, 3400 JP Morgan Chase Tower, 600 Travis Street, Houston, Texas 77002.

Entered this 3rd day of August, 2006.

/s/_____
O.C. SPAULDING, Judge

APPENDIX D

IN THE CIRCUIT COURT OF PUTNAM COUNTY,
WEST VIRGINIA

EAGLE RESEARCH CORPORATION,

Plaintiff,

v. Civil Action No. 03-C-119

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC., and
DANIEL MEASUREMENT SERVICES, INC.,

Defendants and Third Party Plaintiff,

v.

JIM BUTCH,

Third Party Defendant.

CORRECTED AMENDED FINAL JUDGMENT ORDER
and
RULINGS ON POST-JUDGMENT MOTIONS

On May 5, 2006, the Court entered an order granting judgment to the plaintiff. The parties then filed written post trial motions. On June 15, 2006, the parties appeared for purposes of oral argument on their various written post-trial motions. The Court announced its ruling in open court on the various motions, but the parties have been unable to agree upon a written order memorializing the Court's oral rulings. Following the hearing of June 15, 2006, the parties filed motions seeking this

Court's reconsideration of certain rulings of the Court announced at the June 15, 2006 hearing. The motions for reconsideration are considered in a separate order entered this date. Accordingly, the Court is of the opinion to and doth hereby order as follows:

1. The "Motion of Plaintiff for a New Trial Pursuant to West Virginia Civil Procedure Rule 59(a) Against Emerson Electric, Inc. and Daniel Industries, Inc., on the Plaintiffs claims for tortious interference with a contract is hereby **DENIED** for reasons stated upon the record.

2. The "Plaintiffs Motion for Attorney Fees" is hereby **DENIED** as the Court finds that the trade secrets counterclaim did not have a material effect on the Plaintiff and for other reason stated upon the record.

3. The Plaintiff's "Motion for Entry of Judgment Including Award of Pre-judgment and Post-judgment" is granted in part and denied in part as follows:

(a) Post-judgment interest on the total final judgment entered herein is granted pursuant to West Virginia Code §56-6-31 from May 8, 2006, the date of entry of final judgment, at the rate of ten percent per annum. The Court notes that this statute was recently amended by Acts of the Legislature effective June 7, 2006, but finds the former version of the statute applicable to this case.

(b) Pre-judgment interest on the Plaintiff's claim for breach of the contract to purchase the 2,954 flow meters is appropriate pursuant to West Virginia Code §56-6-27 because the Plaintiff's submitted this

cause of action founded on contract to the jury and the jury made an award accordingly.

(c) Pre-judgment interest on the Plaintiffs claim for breach of the confidentiality agreement is denied because the Plaintiff did not submit this cause of action founded on contract to the jury and, therefore, waived any claim for pre-judgment interest on this breach of contract claim.

4. The Plaintiff's "Motion for Appointment of a Commissioner" and request for written and other discovery in aid of execution of judgment is **DENIED** as moot in light of the Court's intention to set an appeal bond at the appropriate juncture and for other reasons stated upon he record.

5. The Plaintiffs "Motion for an Appeal Bond" is deferred until the appropriate time.

6. The Plaintiff's "Motion for the Return of Source Code" is **DENIED**, without prejudice, pending a decision by the Defendants regarding reciprocal treatment of each party's source code, and for other reasons stated upon the record.

7. With respect to the jury's damage award of four million dollars regarding the breach of the contract for the purchase of the remaining 2,954 flow meters, even in a light most favorable to the Plaintiff, the evidence supports an award of no more than $1,993,950.00.

Additionally, the jury awarded the Plaintiff pre-judgment interest of $400,000.00 on its award of four million dollars, but that award should be reduced proportionately.

Accordingly, the Court limits the jury's award of four million dollars for the breach of the contract

claim for the 2,954 flow meters to $1,993.950.00 and the jury's award of $400,000.00 for pre-judgment interest on this claim to $199,395.00, and accordingly hereby enters **JUDGMENT** in these amounts against the defendant, Daniel Measurement Services.

8. Further, the Court concludes, for reasons stated upon the record, that it will not set aside the damage award for breach of the confidentiality agreement as sought by the defendant, but enters **JUDGMENT** against the Defendant, Daniel Measurement Services, Inc., in the amount of $10,500,000.00 for breach of the confidentiality agreement.

9. The Court enters **JUDGMENT** in favor of the Plaintiff, Eagle Research Corporation, on the counterclaim of the Defendant, Daniel Measurement Services, Inc., which were withdrawn during trial, in favor of the Third-Party Defendant, Jim Butch, on the third-party claims of the Defendant, Daniel Measurement Services, Inc.; and in favor of the Defendants, Emerson Electric Co. and Daniel Industries, Inc. on the tortuous interference claims of the Plaintiff, Eagle Research Corporation, because the Plaintiff did not file its claim within the statute of limitations as determined by the jury.

WHEREFORE, the Court is of the opinion to and doth hereby enter **FINAL JUDGMENT** in favor of the Plaintiff, Eagle Research Corporation, against the Defendant, Daniel Measurement Services, Inc., in the total amount of twelve million six hundred ninety-three thousand three hundred forty-five dollars ($12,693,345.00).

The Clerk of this Court is hereby directed to send a copy of this Final Order to (1) Ancil G. Ramey,

Attorney at Law, Post Office Box 1588, Charleston, West Virginia 25326; (2) Roger A. Decanio, Attorney at Law, 1598 Kanawha Boulevard East, Charleston, West Virginia 25311; (3) William C. Forbes, Attorney at Law, 826 Oakwood Road, Charleston, West Virginia 25314; (4) Michael Moore, Attorney at Law, Post Office Box 2031, Charleston, West Virginia 25327; (5) John L. Tate, Attorney at Law, 400 West Market Street, Suite 1800, Louisville, Kentucky 40202-3352; and, (6) Robert J. McAugham, Jr. Attorney at Law, 3400 JP Morgan Chase Tower, 600 Travis Street, Houston, Texas 77002.

Entered this 18th day of August, 2006, nonc pro tunc to August 3, 2006.

/s/_____
O.C. SPAULDING, Judge

APPENDIX E

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd of May, 2007, the following order was made and entered:

Eagle Research Corporation, Plaintiff Below, Respondent

vs.) No. 070375

Emerson Electric Co., Daniel Industries, Inc., and Daniel Measurement Services, Inc., Defendants and Third Party Plaintiffs Below

Daniel Measurement Services, Inc., Petitioner

vs.

Jim Butch, Third Party Defendant Below, Respondent

On a former day, to-wit, February 6, 2007, came the petitioner, Daniel Measurement Services Inc., by Ancil G. Ramey and Hanna B. Curry, Steptoe & Johnson, PLLC; John L. Tate and Jennifer L. Kovalcik, Sites & Harbison, PLLC; Robert J. McAughan, Jr., Locke Liddell & Sapp, LLP; and W. Michael Moore and Rita M. Biser, Moore & Biser, PLLC, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the

Circuit Court of Putnam County, rendered on the 18th day of August, 2006, with the record accompanying the petition. Thereafter, on the 7th day of March, 2007, came the respondent, Eagle Research Corporation, by John E. Sutter, Roger H. Miller, II and Roger A. Decanio, The Sutter Law Firm; and William C. Forbes, Forbes Law Office, its attorneys, and presented to the Court its written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justice Albright and Benjamin would grant.

A True Copy

Attest: /s/_____
Clerk, Supreme Court of Appeals

APPENDIX F

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd of May, 2007, the following order was made and entered:

Eagle Research Corporation, Plaintiff Below, Appellant

vs.) No. 33442

Emerson Electric Co., Daniel Industries, Inc., and Daniel Measurement Services, Inc., Defendants and Third Party Plaintiffs Below, Appellees

vs.

Jim Butch, Third Party Defendant Below, Appellee

On a former day, to-wit, February 6, 2007, came the petitioner, Eagle Research Corporation, by John E. Sutter, Roger H. Miller, II and Roger A. Decanio, The Sutter Law Firm; and William C. Forbes, Forbes Law Office, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Putnam County, rendered on the 18th day of August, 2006, with the record accompanying the petition. Thereafter, on the 7th day of March, 2007, came the respondents, Emerson Electric Co., et al., by Ancil G. Ramey and Hanna B. Curry, Steptoe & Johnson,

PLLC; John L. Tate and Jennifer L. Kovalcik, Sites & Harbison, PLLC; Robert J. McAughan, Jr., Locke, Liddell & Sapp, LLP; and W. Michael Moore and Rita M. Biser, Moore & Biser, PLLC, their attorneys, and presented to the Court their written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said petition for appeal.

It is hereby ordered that the above-captioned proceeding be heard, submitted and determined upon the original record, briefs of counsel and oral argument, if requested by the parties.

It is further ordered that the appellant file an original and nine copies of a brief within thirty days of receipt of this order; the appellees to file a like number of briefs thirty days of receipt of the appellant's brief, with any reply brief deemed necessary to be filed within fifteen days of receipt of appellees' brief.

A True Copy

Attest: /s/ _____
Clerk, Supreme Court of Appeals

APPENDIX G

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 27th of May, 2007, the following order was made and entered:

Eagle Research Corporation, Plaintiff Below, Appellant

vs.) No. 33442

Emerson Electric Co., Daniel Industries, Inc., and Daniel Measurement Services, Inc., Defendants and Third Party Plaintiffs Below, Appellees

Daniel Measurement Services, Inc., Petitioner

vs.

Jim Butch, Third Party Defendant Below, Respondent

On a former day, to-wit, June 12, 2007, came the appellant, Eagle Research Corporation, by John E. Sutter, Robert H. Miller, II and Roger A. Decanio, The Sutter Law Firm, PLLC; and William C. Forbes, Forbes Law Office, its attorney, and presented to the Court its motion in writing to dismiss the above-captioned proceeding for the reasons stated therein. Thereafter, on the 22nd day of June, 2007, came the

appellee, Daniel Measurement Services, by Ancil G. Ramey and Hannah B. Curry, Steptoe & Johnson, PLLC, its attorneys, and presented to the Court its written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby grant said motion to dismiss. It is therefore ordered, that the above-captioned matter be, and it hereby is, dismissed from the docket of this Court.

A True Copy

Attest: /s/_____
Clerk, Supreme Court of Appeals

APPENDIX H

IN THE CIRCUIT COURT OF PUTNAM COUNTY,
WEST VIRGINIA

EAGLE RESEARCH CORPORATION,

Plaintiff,

v. CIVIL ACTION NO. 03-C-119

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC.,
DANIEL MEASUREMENT SERVICES, INC.,
and VALTRONICS, INC.,

Defendants,

v.

JIM BUTCH,

Third-Party Defendant.

Proceedings had and testimony taken in the trial of the above-styled action before the Honorable O.C. Spaulding, Judge, and a jury, beginning on Tuesday, the 28th day of March, 2006, and continuing through Wednesday, the 12th day of April, 2006.

* * * *

[Pages 328-336]

* * * *

Q And did you calculate the average options that they bought from those 46 when you reached the number?

A Yeah. It would have been something in the twelve hundred -- we have $1,284 estimated here. So half of that, $642.

Q Times?

A Times 2,954, that's $1,897,000 so the two added together is about $3,891,000. And there's two years lost time too, because we -- there was two years lost time because of the time we put into this project, or roughly two years.

MR. SUTTER: Let me ask madam court reporter if she has a sticker.

MR. TATE: Go ahead and mark it, but may we approach, Your Honor?

Whereupon counsel approached

the bench and the following proceedings were had out of the presence and hearing of the jury:

MR. SUTTER: For the record, I've marked his arithmetic as Plaintiff's Exhibit No. 748.

MR. TATE: I object to the document, Your Honor, it's clearly hearsay. The witness has testified as to what he's done. This document is now hearsay. And I will point out to the Court that it's dated two days ago. It's never been provided to us, clearly created for the purposes of this litigation, and for reasons I don't understand it says CPA Dan Selby at the top, and I object to the introduction of the document. Also there's some information here that hasn't been testified to. Loss of competitive advantage, whatever that is.

MR. SUTTER: First of all, it certainly is not hearsay since the declarant is in Court testifying about it. That has to be -- the declarant not available in Court to cross-examine.

Number two, this is simply arithmetic. He testified to the numbers and how he did them. This is simply the numbers.

THE COURT: So if you already have the evidence, why do you need it in twice?

MR. SUTTER: Because the jury needs, the jury may not, and he said the numbers fast and the jury may not have written them down properly. We've excluded Mr. Selby, we need some way to get our damages into evidence.

THE COURT: I'm with you, but don't you already have that? Didn't he just testify?

MR. SUTTER: He testified to it. This is simply his calculations. All it is is arithmetic. It's like having an expert testify to something and then putting his drawing into evidence.

THE COURT: It's a drawing memorializing what he just told the jury as to how he calculated his damages.

MR. SUTTER: Yes.

THE COURT: And what does CPA Dan Selby that's on there, have to do with that? Is there any testimony to that?

MR. SUTTER: Probably nothing and we will redact that.

THE COURT: And how about at the bottom, I don't know what that is. Loss of -- he's suggesting that there's some other damages that he's due?

MR. SUTTER: He will testify as far as the loss of competitive advantage.

THE COURT: Well, he hasn't yet.

MR. SUTTER: Yes.

THE COURT: So I'm not going to let it in yet. Okay. I will tell you that I will admit it over the objection, provided (1) you redact out the CPA stuff. That gives it some authenticity that doesn't exist.

MR. SUTTER: I understand.

THE COURT: (B) you're going to have to account for all the information in there. I mean, and specifically I'm dealing with that last issue, I don't know what that means, and competitive advantage thing. You accomplish that, I'll admit it over the objection of the defendant.

MR. SUTTER: Can we take a break? We've been going for an hour.

THE COURT: Well, it depends on how close you are to finishing with him. Can you give me a read on that?

MR. SUTTER: Pretty close.

THE COURT: See, in some respects I"d love for you to be able to finish, give him a break, before we turn him over to Mr. Tate. If you're getting close to finishing, I"d like for you to go ahead and finish up.

MR. SUTTER: I'll try to do that.

THE COURT: Can you give me a rough idea?

MR. SUTTER: Ten, fifteen minutes.

THE COURT: That would work out a little bit better. That will get us down to 3:15, 3:20, we could break then.

MR. SUTTER: Would you want to inquire about the diabetic, if he wants to take a break?

THE COURT: I don't want to.

Whereupon counsel returned to counsel tables, where the proceedings were resumed in the presence and hearing of the jury as follows:

BY MR. SUTTER:

Q Mr. Butch, as a result you contend that Emerson and DMS and Daniel breached the confidentiality agreement, correct?

A Yes.

Q What damages, if any, have you incurred as a result of the breach of the confidentiality agreement?

MR. TATE: Objection, Your Honor, speculation, lack of foundation.

THE COURT: How do you compute it? What's it based on? Give a foundation.

MR. SUTTER: Let me rephrase the question.

Q Is it your contention that Emerson copied your computer and made a competing computer from that?

A It's my contention --

MR. TATE: Objection, Your Honor, lack of foundation.

THE COURT: Okay. Start the who, what, when, where, why kind of questions, okay, as opposed to telling him what his contention is, so he can just affirm. Okay. No leading question. Open ended question. And then I'll allow you to follow up.

MR. SUTTER: Part of the problem is -- I don't want to -- Some of the evidence hasn't come in yet that will come in with Mr. Johnson. I could give him a hypothetical.

THE COURT: We're talking about, I take it, the information that's at the bottom of that document?

MR. SUTTER: Yes.

THE COURT: And he has an opinion, does he not, does your client have an opinion that he wishes to give at this time as to what's at the bottom of that document?

MR. SUTTER: Yes.

THE COURT: And does he have a basis to give that opinion?

MR. SUTTER: Just his own business experience.

THE COURT: So establish the foundation. Show me that he knows that business, he knows the loss, and he would have an opinion as to what the loss would be.

MR. SUTTER: May I approach, Your Honor?

Whereupon counsel approached the bench, where the following proceedings were had out of the hearing of the jury:

MR. SUTTER: He will testify that he is -- he's not going to testify about a number. He's going to testify that he lost a competitive advantage in the market place because his competitor produced an identical machine. Now, he can't testify to their profits because that's -- he doesn't know that. They've produced what their profits were, and I intend to enter that into evidence later in this.

But putting that aside, I believe that a loss of competitive advantage, while it's not quantified, is an element of damages in a breach of contract -- I mean breach of confidentiality claim, and he's going to testify generally as to how far it set his business back.

MR. TATE: Your Honor, number one, this is all brand new stuff. Mr. Butch has testified into five volumes of sworn testimony. He's never been identified as an expert on the loss of competitive advantage. I have no idea what he's going to say that the "loss of competitive advantage" is, or what methodology -- if we may for a moment consider that he's an un-designated expert -- what methodology he intends to use to develop this, number one.

Number two, what the heck is loss of competitive advantage? Where is that as an element of damage of any cause of action that the plaintiff has advanced? Where is the law that says that they have a damage, a cause of action for that particular damage category? How is it measured? What does the law say it requires as a showing for evidence?

Number three, there's been no foundation established for this alleged stolen computer. The only thing we have in this case is Mr. Decanio's opening statement. Mr. Butch is an electrical engineer who's the president of this company and they have not asked him a single question about the technology that he contends is in the Fisher FloBoss. How in the world can this man testify that he's lost a competitive advantage about --

MR. SUTTER: Let me --

MR. TATE: Excuse me -- about something that has never been identified, which one might presume

he is qualified to testify about since it's electrical engineering on his product. But instead, the plaintiff proposes to bypass that completely and use Mr. Butch --

MR. SUTTER: I could short circuit your argument.

MR. TATE: -- use Mr. Butch as an expert on something called the loss of competitive advantage under the law.

MR. SUTTER: First of all, Your Honor, my problem is much of my foundation is going to come through, as far as the facts, what happened, through Professor Nutter's testimony as an expert, Mike Johnson and Lee Burkett. With that foundation I believe he can, and to short circuit this whole thing, if I would be allowed to recall him for the sole purpose of establishing his damages after those witnesses testify, it would probably solve the problem.

MR. TATE: He can recall his client any time he wants, Your Honor. After I cross-examine him, he can put him back on the stand if he wants to.

MR. SUTTER: But that way we have a foundation.

MR. TATE: But I think otherwise we're completely adrift here in terms of this witness testifying on this topic that we've never heard before and that he's not been qualified.

THE COURT: Okay, I will agree then to allow you during your case-in-chief to recall Mr. Butch solely for the purpose of testifying as to what is a competitive advantage, how that comes about, what the heck it is. Lay the foundation, assuming you

have at that time already established through evidence of Mr. Nutter or somebody that this device was purloined by somebody else and that they lost something.

MR. SUTTER: Fine. Your Honor, we've taken up a lot of time here and I might have another ten minutes.

THE COURT: We'll quit then. I was hoping to kind of complete with this witness, but we're not.

Whereupon counsel returned to counsel table, where the proceedings resumed in the hearing of the jury as follows:

THE COURT: Members of the jury, then we'll take a break at this time. Do not discuss the facts of this case. We'll return to the courtroom shortly.

Whereupon the jury was excused from the courtroom, where the proceedings resumed out of the presence and hearing of the jury as follows:

THE COURT: Now, we will stand in recess. You may not discuss with your client at all. During the break normally your lawyer wouldn't be allowed to confer with you in the middle of your testimony, so this is no different. You . . .

* * * *

Thursday, April 6, 2006

[Pages 1586-87]

* * * *

. . . were clear enough under the rules for notice pleading. It's always better to be more precise.

THE COURT: Okay. Next issue.

MR. MILLER: Your Honor, on Paragraph 7 -- I'm sorry, Page 7, in regard to when a cause of action accrues, we have certainly the appropriate language concerning when the plaintiff should become aware using reasonable diligence, but I believe it's a two pronged test for the discovery rule. One is knowing or should have known when the plaintiff has been injured; and the second element is knowing or should have known the identity of the wrongdoer. I think we need an additional sentence that includes that second element as to the identity of the wrongdoer.

Okay. Now, turn to Page 8, last full paragraph. While we don't have any problems with the Court's fair, adequate compensation for such loss of damage, we believe that it's also appropriate to go into a little bit more detail in regard to the damages which the plaintiff is claiming. And we would like the Court to also include in its charge our instruction concerning lost profits of the plaintiff arising from the breach of the purchase agreement for the 3000 flow computers and also the recovery of the defendant's profits for the breach of the confidentiality agreement. Those would be previously proffered Instructions 30-A and 30-B, which again because we've given you so much paper, I can provide you with my two somewhat messy copies if you'd like, Your Honor.

THE COURT: It would be a help.

MR. MILLER: 30-A pertains to lost profits for breach of the contract for sale of the 3000 flow computers. 30-B is for the breach of the confidentiality agreement. One issue too --

MR. TATE: For the record, Your Honor, we object to those.

THE COURT: I'm going to come back.

MR. TATE: It's simple just to say we don't think that's appropriate. That's all I need to say at this point.

MR. MILLER: Your Honor, we have the requirement too in a contract case -- I never really understood this rule, but it's by statute -- in order for there even to be the possibility to obtain prejudgment interest in a contract case, the jury has to be instructed as to the possibility of that element.

THE COURT: We can't in a contract case, we can't -- the Court can't add it?

MR. MILLER: No, sir, not according to my reading of the Thompson v. Stuckey case. And so therefore we believe it is incumbent on us to ask the Court to provide an instruction in regard to prejudgment interest in a contract case. If we . . .

* * * *

Tuesday, April 11, 2006

[Pages 1626-27]

* * * *

. . . prohibits its unauthorized use. A breach of the confidentiality agreement occurs when a party acts in a manner prohibited by the confidentiality agreement.

In deciding whether the mutual confidentiality agreement was breached, you should look to the terms of the agreement itself to determine the type of information that could or could not be disclosed, and to determine to whom the information could be disclosed.

Unless a term in the agreement is given a particular meaning in the agreement, words used by

the parties in the agreement should be given their ordinary, usual and popular meaning. If a term is ambiguous or uncertain, but the parties by their conduct have placed a construction upon the term which is reasonable, you may likewise apply the same meaning to the term as the parties have demonstrated by their conduct.

Therefore, in order for the plaintiff, Eagle Research, to prevail, you must find by a preponderance of the evidence that the defendants breached the parties' confidentiality agreement by either improperly disclosing the confidential information learned pursuant to the confidentiality agreement and/or improperly using confidential information learned pursuant to the confidentiality agreement.

If you find by a preponderance of the evidence that the defendant, DMS, breached the confidentiality agreement entered into by Eagle Research and DMS, then you may award damages in an amount of money which fairly compensates Eagle Research to the extent possible for reasonably ascertainable losses proximately caused by the breach.

In its third cause of action, the plaintiff, Eagle Research, alleges that defendant Emerson Electric, and/or Daniel Industries tortiously interfered with both of the alleged contracts between Eagle Research and the defendant, Daniel Measurement Services. That is, the plaintiff claims that the defendants tortiously interfered with their alleged contract for the purchase of the 3000 flow computers and the parties' mutual confidentiality agreement.

Tortious interference with a contract is a tort claim and is not a claim in and of itself for the breach

of a contract. However, before you may consider a tort claim for the tortious interference with a contract, you must in the first instance believe that a contract actually exists.

Tortious interference with a contract is committed when a contractual or business relationship is intentionally interfered with by a party outside such relationship, and the interference causes harm to the relationship. In order to determine whether an actor's conduct in intentionally interfering with a contract of another is improper or not, consideration may be given to the nature of the actor's . . .

* * * *

APPENDIX I

IN THE CIRCUIT COURT OF PUTNAM COUNTY, WEST VIRGINIA

EAGLE RESEARCH CORPORATION,

Plaintiff,

v. CIVIL ACTION NO. 03-C-119

EMERSON ELECTRIC CO.,
DANIEL INDUSTRIES, INC.,
DANIEL MEASUREMENT SERVICES, INC.,
and VALTRONICS, INC.,

MOTIONS HEARING had in the above-styled action before the Honorable O.C. Spaulding, Judge, on Thursday, the 16th day of March, 2006.

* * * *

[Pages 138-40]

* * * *

. . . hired Lee Burkett as his personal employee is outside of the facts and outside of the evidence in this case, completely wrong, making up an argument. It's spinning the yarn and it's not applicable here.

Mr. Butch should get granted summary judgment because he did not breach a duty to anybody. In fact, he met his duty to his company and that goes for Eagle Research as well.

What can they do with this information? They have to go to an attorney and bring it before you, Your Honor, respectfully, bring it before the people of Putnam County to determine what these bad acts really were, let them decide. That's why this was brought up. That's why it was taken to an attorney. There was nothing wrong here. They did nothing wrong. No breach whatsoever, legal or otherwise.

THE COURT: Okay. Gentlemen, let's take them up one at a time. Let me make an opening comment. Mr. Tate, I'm going to deal with all motions for summary judgment. You started out the day trying to impress me with academic credentials of the defense team in this case and I'm sure that's going to play well with the Putnam County jury here as well as it played with me. Let me tell you, I'm sure you have done your homework, and if you've done your homework you've done your homework on me and you'll know what my reversal rate is. And I will tell you in the field of civil law, civil litigation, the only time I've ever been reversed in 14 years is when I grant summary judgment. There's one thing I have learned in the State of West Virginia the hard way, this ain't Texas, this ain't Kansas, this is West Virginia, and we don't give summary judgment. Every time I do, I get reversed. Not every time literally, but that's where it is. Our system favors taking it to a jury. And I'm going to allow all of these to go to a jury. Plain and simple. All of your's, all of the plaintiff's. Even the individual one against Mr. Butch. I don't know how you all are going to argue all of this and present all this to a jury. That will be your problem.

Let me give you one forewarning, if I can, Mr. Decanio, that, you know, your argument on accord

and satisfaction, you know, just read the letter, takng out the parentheses. This is from Mr. Milliken. "I agreed to pay the in-house invoices in consideration that no more shipments, related invoices, nor any other future charges incurred by your company or supply line expenses to your company will be billed to Daniel Measurement Services."

Boy, that's a sure strong statement to me that Daniels viewed that as end of the deal. Here's our money, take it. Pretty strong statement. And I'm sure you're going to hear that and the jury is going to hear that.

Having said that, let's go to, let's quickly get through all of our motions on evidence.

All right, I got defendant's designation of fact witnesses file by James Butch. You essentially say "Judge, you're trying to get in the back door what you've prohibited in the front door." I got no response from Mr. Decanio. I take it you agree?

MR. DECANIO: No, Your Honor. I tried to respond to everything in this case. The Order, first of all the Amended Complaint and the Order granting defendants' claim against Jim Butch individually occurred after the deadline of the fact witness disclosure. Accordingly he's entitled to a defense. It's our position that Mr. Butch as an individual, who wasn't a party to the original Scheduling Order should be entitled to bring some of the witnesses he feels are important for his defense and the way I think that he should be allowed to do so.

THE COURT: Your reply?

MR. MOORE: Your Honor, I'll reply to that issue as there's an aiding and abetting claim against Mr. Butch. None of these witnesses they want to call that were previously excluded by the Court in the November 4th hearing have any relationship or relevance to that third-party claim for him to call them individually. For instance, the identities of the . . .

* * * *

APPENDIX J

SUPERCONFIDENTIAL

Use and Disclosure Restricted by Order of the Putnam County Circuit Court of West Virginia, Civil Action No. 03C119

NOT TO BE FILED UNLESS UNDER SEAL

YEAR	PRODUCT	NUMBER OF UNITS SOLD	AVERAGE UNIT SALES PRICE	AVERAGE UNIT COST TO PRODUCE
1999	FloBoss 103	0	$0	$0
1999	FloBoss 104	0	$0	$0
2000	FloBoss 103	0	$0	$0
2000	FloBoss 104	0	$0	$0
2001	FloBoss 103	0	$0	$0
2001	FloBoss 104	0	$0	$0
2002	FloBoss 103	456	$877	$570
2002	FloBoss 104	0	$0	$0
2003	FloBoss 103	1,985	$1,339	$829
2003	FloBoss 104	90	$2,167	$1,341
2004	FloBoss 103	2,889	$1,685	$991
2004	FloBoss 104	44	$2,386	$1,105
2005 (partial)	FloBoss 103	3,554	$1,661	$957
2005 (partial	FloBoss 104	115	$1,904	$857

Plaintiff's Exhibit

700

APPENDIX K

FLOWBOSS 103 AND 104 PROFITS

FB 103

YEAR	PRICE	MARGIN	UNITS SOLD	PROFIT
2002	$3500	x .45	456	$718,200
2003	$3500	x .45	1985	$3,126,375
2004	$3500	x. 45	2889	$4,550,175
2005	$3500	x .45	3554	$5,597,550
			TOTAL	$13,992,300

FB 104

YEAR	PRICE	MARGIN	UNITS SOLD	PROFIT
2002	$2900	x .45	0	$0
2003	$2900	x .45	90	$117,450
2004	$2900	x. 45	49	$57,420
2005	$2900	x .45	115	$150,075
			TOTAL	$324,945

GRAND TOTAL PROFITS: $14,317,245

FB 103 Price quoted as $3500
FB 104 Price quoted as $2800-$3000

Plaintiff's Exhibit F

APPENDIX L

**IN THE CIRCUIT COURT OF PUTNAM COUNTY,
WEST VIRGINIA**

EAGLE RESEARCH CORPORATION,

Plaintiff,

v. **Civil Action No. 03-C-119**
Judge Spaulding

**EMERSON ELECTRIC CO., et al.,
DANIEL INDUSTRIES, INC.,
DANIELS MEASUREMENT SERVICES, INC.,
and VALTRONICS, INC.**

Defendants.

v.

JIM BUTCH

Third Party Defendant.

PLAINTIFFS' RESPONSE TO DEFENDANTS, MOTION TO SET ASIDE THE VERDICT AND IN THE ALTERNATIVE FOR A NEW TRIAL

* * * *

II. DEFENDANTS' MOTION ON THE MUTUAL CONFIDENTIALITY AGREEMENT SHOULD BE DENIED

* * * *

C. THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S AWARD OF $10,500,000.00.

The Defendants argue that the damages sustained as a result of the breach of the Mutual Confidentiality Agreement is "mere speculation or conjecture" and even went further, claiming there was "no evidence or testimony whatsoever." Yet again, the Defendants are patently wrong.

Defendants' counsel generated and produced in discovery a chart pertaining to the number of units sold, average sales price and profits for the FB103 and FB104. This was shown to Randy Page during his cross examination. In a shocking admission, Randy Page testified that these numbers were low. **Plaintiff's Motion Exhibit E.**

Based on Randy Page's admission of artificially low numbers in the document generated by Defendant's counsel, Plaintiff then created a demonstrative exhibit that was consistent with Mr. Page's testimony at trial. **Plaintiff's Motion Exhibit F.**

In **Plaintiff's Motion Exhibit F**, Defendants total profits for Emerson's FB103 was $13,992,300.00. The total profits for Emerson's FB104 was $324,945.00. Although Plaintiff does not know for certain how the jury arrived at the final amount, it appears that the jury may have extracted the unjust enrichment of Defendants and rounded

down the number to $10,500,000.00, relying upon **Plaintiff's Motion Exhibit F.**

Paragraph E of the Mutual Confidentiality Agreement specifically allows for damages, which include equitable remedies in addition to "any other remedies." Eagle 121 **Plaintiff's Trial Exhibit 45.**

It is proper in contract damages to disgorge unjust enrichment for breach of a non disclosure agreements such as in this case. The Court in *Ajaxo v. E*Trade Group, Inc.* 135 Cal.App.4th 21, 37 Cal.Rptr.3d 221 (2006) held that extracting Defendants' unjust enrichment was proper compensation for breaching a non disclosure agreement. *Id.* at 56-57. At issue in this case, was the breach of a non disclosure agreement of wireless stock trading technology. The Court endeavored to put the Plaitiff in as good as position as he would have occupied had the non disclosure contract been performed. *Id.* at 55-56. The Court explained that unjust enrichment is used synonymously with restitution. When the party in that case breached the non disclosure agreement, it should make restitution. *Id.*, citing 1 Corbin on Contracts (revised edition) § 1.20, p.63. Like the non disclosure agreement in this case, it allowed equitable restitution in addition to other damages at law. The Court further stated as follows:

> The remedy of restitution differs from the remedy in damages in that awarding damages the purpose is to put the injured party in as good a position as he would have occupied, had the contract been fully performed, while in enforcing restitution, the purpose is to require the wrongdoer to restore what he has received and thus tend

> to put the injured party in as good a position as that occupied by him before the contract was made. Originally restitution requires that the defendant shall give something back to the plaintiff; and it may supposed that the defendant cannot do this unless he has received something of value at the plaintiff's hands.
>
> *Id.* at 56, citing 12 Corbin on Contracts (Interim Edition) § 1107, p.24

Plaintiff may recover what it lost, its technology, by recovering the profits Defendants gained as a result of the breach of the Mutual Confidentiality Agreement. Other Courts have also measured the value of what the Plaintiff lost by measuring what the defendants gained as a result of the breach of a confidentiality agreement. For example, the Court in Saforo & Associates, Inc., GEO v. Porocel Corp., 337 Ark. 553, 991 S.E.2d 117 (1999) permitted damages to be calculated by either plaintiff's lost profits or by defendant's gain, but not both. See also *Carbo Ceramics, Inc., v. Keefe*, 2006 WL 197340 (5th Cir., Tex).

Similarly, Eagle conferred a benefit on DMS, and unknowingly its parent company, by sharing its technology. When DMS breached the Mutual Confidentiality Agreement, then Defendants received a benefit to keep it competitive without compensating Eagle. It created a smaller, cheaper, more functional product, the FB 103 and 104 computers. Defendants destroyed of the value of the discovery of Eagle's flow computer and mitigated the advantage Eagle had in technology and functionality by unfair means. Defendants obtained the desired knowledge of Eagle's technology without paying the

price in labor, money, or machines expended by Eagle, thereby unjustly enriching themselves. Eagle must be compensated for DMS's breach by disgorging its unjust enrichment. Accordingly, there was reasonable evidence for the jury to base its damages. Defendants' motion should be denied.

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